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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Petitioners,

vs.

CITY OF CHARLOTTE, NORTH CAROLINA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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53 pp

Questions Presented

1. May an individual who has been the victim of racial discrimination in employment, in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983, recover compensatory damages for emotional and mental distress without being required to make a showing of psychological or medical harm?

2. Must a Court of Appeals, in considering the sufficiency of the evidence to support a claim for damages for compensatory damages for emotional distress by one who has been the victim of racial discrimination in employment in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983, take into account the circumstances surrounding the discriminatory actions, and not just the victim's description of the effects of the action on him?

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DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Petitioners,

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CITY OF CHARLOTTE, NORTH CAROLINA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners Darrell A. Price, David H. Holland, Robert A. Holl, Oswald D. Holshouser, Raymond T. Carlton, S. Vance Elstrom, and Mark E. Corwin petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review that Court's decision filed September 3, 1996, setting aside a jury's award of damages to each of $3,000.00 and holding that they may not recover any compensatory damages for an acknowledged constitutional violation.

Opinions Below

The decision by the district court is not reported. The decision of the Court of Appeals is reported at 93 F.3d 1241.

Jurisdictional Statement

The Court of Appeals rendered its Opinion on September 3, 1996. Petitioners timely moved the Court for rehearing with a suggestion that rehearing be en banc. The Court of Appeals denied the petition for rehearing on September 30, 1996. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(a):

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the

United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Amendment VII, Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, § 1, Constitution of the United States:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioners are seven white police officers employed

by the City of Charlotte[1] who, in 1991, were candidates for promotion to sergeant with the Charlotte Police Department. The 1991 promotion processwas represented by high level managers of the Police Department to be one that was completely free from any racial considerations. These managers represented to petitioners that the City had fully complied with the terms of a 1974 consent order which had required the City to promote a quota of black officers until blacks were sufficiently represented in the rank of sergeant.

The City's stated policy was to promote from a roster of candidates who had been ranked according to their performance on various selection procedures.

The City promoted 21 officers to sergeant. For the first 18 promotions, it selected applicants in numerical order from the roster. There was one black officer in the first 18 officers promoted. Contrary to what management had told the petitioners, the City continued to maintain a policy of ensuring that 25 percent of all promotions to sergeant would go to black applicants, regardless of relative qualifications, and the City determined that it would have to promote three additional black candidates to satisfy that quota. It therefore skipped over a number of white applicants to select black applicants who ranked 29, 62 and 74 on the promotion roster. None of these three officers would have been selected had he or she not been black. All of the petitioners ranked higher than at least the two black officers ranked 62 and 74. However, none of the petitioners would have been promoted in any event because other white officers ranked higher than

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[1]Petitioner Carlton has retired since the initiation of this action.

did petitioners.[2] Petitioners learned that city management had lied to them about the non-discriminatory character of the process when one of their co-workers who worked side-by-side with them — the black officer who ranked 62nd — was promoted over all of them.

Petitioners brought an action challenging the City's program of promoting on the basis of racial quotas as violative of the Equal Protection Clause Fourteenth Amendment. The district court granted partial summary judgment, 802 F.Supp. 1361 (W.D.N.C. 1992), holding that the City's promotion policy violated the Equal Protection Clause and 42 U.S.C. § 1983. The City and the intervenor, North State Law Enforcement Officers Association, appealed. The Court of Appeals affirmed the determination that the policy was unconstitutional. 10 F.3d 207 (4th Cir. 1993).

Following remand from the Court of Appeals, petitioners' claims for damages were tried before a jury. Each petitioner described: (a) his efforts to advance himself in his career in the Charlotte Police Department, (b) how he had done so under explicit assurance from the City that the promotion decisions in question would be made on a non-discriminatory basis, without regard to race, and (c) how his learning that the truth was something else and that the deck had actually been stacked against him in advance affected him. The jury awarded each petitioner $3,000.00 in compensatory damages.

The district court denied the City's motion for

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[2] Two other plaintiffs, Ronald Hayes and Randy Hagler, ultimately received promotions as a result of this action. Both were also awarded compensating damages of $3,000.00. Even though the evidence that they presented was indistinguishable from that of the petitioners, the City did not appeal from the judgment in favor of Hayes and Hagler.

judgment as a matter of law, holding that petitioners were entitled to recover damages even though they had not been denied a promotion, and holding that sufficient evidence had been presented to support the jury's verdict.

On appeal, the City again contended that petitioners could not recover damages, where they had not been denied a promotion, and that the evidence in any event would not support an award of any damages. The Court of Appeals rejected the first position and held that petitioners were entitled to recover damages based on their having been subjected to a discriminatory selection practice. [3]

The Court of Appeals agreed, however, with the City that the jury's verdict in each petitioner's favor was not only excessive but that each petitioner could not recover *any* damages. It therefore held that petitioners were only entitled to recover nominal damages of one dollar each.

The district court had jurisdiction in the first instance under 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

Reasons for Granting the Writ

This case presents the issue of the quantity and nature of proof required for victims of racial discrimination to recover compensatory damages for deprivation of constitutional rights. Petitioners' entitlement to recover compensatory damages for mental and emotional distress caused by the City's violation of the Constitution is clear under *Carey v. Piphus,* 435 U.S. 247, 263-264 (1978). See also *Memphis Community School District v. Stachura,* 477 U.S. 299, 307 (1986) (damages under § 1983 include not just out-of-pocket

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[3]That aspect of the Court of Appeals decision is not at issue here.

losses but also impairment of reputation, personal humiliation and mental anguish and suffering) and *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 349-350 (1974). The Court of Appeals, however, held that petitioners had not adduced sufficient evidence to support even the most modest award of damages. In doing so, the Court of Appeals has erected a barrier to the vindication of such Constitutional violations with a standard of proof which is contrary to what is required by this Court and by other Courts of Appeals.

Each petitioner recounted his efforts to advance himself by promotion within the City's Police Department and how he felt betrayed or deceived upon learning that the City had lied to them about the use of race in making promotions.

The City claimed that it was, for the first time since 1974, using a promotional process which was not controlled by a 1974 consent order requiring that 25 percent of sergeant promotions go to blacks, regardless of relative qualifications. In fact, the City was continuing to do business as usual by reserving 25 percent of all promotions for black applicants. The only difference in 1991 was that the City had affirmatively concealed from petitioners the fact that it would be using racial quotas.

The Court of Appeals did not consider evidence of these circumstances as being significant in passing on the sufficiency of the evidence; it limited its consideration of the petitioners' testimony as to how the City's treatment had affected them and how they felt as a result of the City's actions. As to that evidence, it found that such evidence was too vague or conclusory and that it would not support an award of damages. The Court of Appeals pointed to such factors as the lack of medical, psychological and psychiatric treatment, out-of-pocket losses and independent corroboration

as being persuasive.[4] It also was apparently persuaded because petitioners' testimony was succinct and occupied only a few pages of the transcript.

The Court instead created a new rule, that in order to recover of compensatory damages, a plaintiff must show "demonstrable emotional distress, which must be sufficiently articulated." What such evidence must consist of is never specified, but it obviously excludes from its scope an individual describing how he has been personally affected by his employer's duplicity. It evidently requires more pages of transcript, as well as evidence of psychological, psychiatric or medical diagnosis and independent corroroboration in order for the issue even to be presented to the jury. In effect, the Court of Appeals has re-examined the jury's verdict, in violation of the Seventh Amendment, and had held that, as a matter of law, petitioners' evidence is unworthy of belief.

This new rule improperly limits the type of evidence which will support a verdict for compensatory damages. It conflicts both with the approach taken by other Courts of Appeals and by this Court.

A.

The Decision Conflicts
With Harris v. Forklift Systems
by Requiring Evidence of Psychological Harm.

The decision of the Court of Appeals conflicts with *Harris v. Forklift Systems Inc.*, __ U.S. ___, 114 S.Ct. 367, ___ L.Ed.2d ____ (1993), which held that a plaintiff seeking damages in a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., need not demonstrate the

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[4]In view of the reliance placed on the absence of these factors, the "holding" that such evidence is not required in order to support a jury award rings hollow.

existence of psychological injury in order to secure relief.

Harris recognized:

> But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

114 S.Ct. at 370-371.

Had the Court of Appeals applied the *Harris* rule, it would have reached a result different from that here. The petitioners' evidence demonstrated that, while each petitioner strove to maintain his job performance notwithstanding his mistreatment by his employer, each was negatively affected by such mistreatment.

Harris arose under a federal statute, rather than under the Constitution. Its rationale should be more forcefully applied to claims which arise under the Fourteenth Amendment to the United States Constitution.

Moreoever, 42 U.S.C. § 1988 requires that § 1983 be

> enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect.

There is no reason that these two provisions — Title VII on the one hand and the Constitution and § 1983 on the other — should not be enforced consistently. Once that standard is invoked, it follows that the rule created by the Court of Appeals is inconsistent with that created by *Harris v. Fork Lift Systems Inc.*

B.

The Decision Fails to Consider the Circumstances Surrounding the City's Discrimination Against Petitioners.

The Court of Appeals decision conflicts with the rule of *Harris v. Fork Lift Systems* and *Carey v. Piphus*, as well as that followed in other circuits, that the circumstances surrounding the discrimination, as much as the plaintiffs' testimony itself, will support a verdict awarding damages.

> Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing *the nature and circumstances of the wrong* and its effect on the plaintiff.[20] In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.
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> [20]We use the term "distress" to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

Carey v. Piphus, 435 U.S. at 263-264 (emphasis added).

Similarly, *Harris* requires the factfinder to look, not just at the effect on the victim, but also at all of the surrounding circumstances. 114 S.Ct. at 371.

Other Courts of Appeal require that verdicts consider the surrounding circumstances as well. *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974); *Crumble v. Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977); *Gore v. Turner,* 563 F.2d 159, 146 (5th Cir. 1977) (damages for emotional distress "may be inferred from the circumstances as well as proved by the testimony"); *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983) (accord); *Johnson v. Hale*, 13 F.3d 1351, 1352-1353 (9th Cir. 1994) (remand for failure to award adequate damages even though the defendant was "very polite" while discriminating); *Matlock v. Barnes*, 932 F.2d 658, 667 (7th Cir. 1991) (distinguishing *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), cert. den., 455 U.S. 1021 (1982), heavily relied upon by the Court of Appeals, panel here, because no evidence presented there of the surrounding circumstances).

Unlike these decisions, the Court of Appeals focused exclusively on the "effect on the plaintiff" and gave no weight or consideration to the surrounding circumstances which would support the jury's award, factors such as the hundreds of hours of preparation that petitioners applied towards being promoted, in reliance on the assurances that promotion process would be made without regard to race, the covert nature of the City's use of racial quotas,[5] and the City's outright lying to petitioners about how the promotions would be made in a totally non-discriminatory fashion.

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[5]The nature of the promotion process became known to petitioners' only because one of their black co-workers, who was promoted over them, disclosed what his score on the promotion process was.

Conclusion

For the reasons stated, the Court should issue a writ of certiorari to review the decision by the Court of Appeals.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-91-0158-P

RONALD M. HAYES, RANDY L. HAGLER, DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Plaintiffs,

v.

CITY OF CHARLOTTE,

Defendant,

and

NORTH STATE LAW ENFORCEMENT OFFICERS ASSOCIATION,

Intervenor-Defendant.

ORDER

THIS MATTER is before the Court on Defendant's, City of Charlotte, renewed motion, pursuant to Rule 50(b), filed December 7, 1994, for judgment as a matter of law, following a jury trial in which the jury ruled in plaintiffs favor. Plaintiffs filed a brief in opposition to Defendant's motion for judgment on December 13, 1994. The Court has reviewed the renewed motion for judgment and the brief in opposition to the motion as well as the relevant legal authorities.

The Defendant's direct the Court to their previously denied motion for partial summary judgment at pages 6-11, and again argue that plaintiffs Price, Holland, Holl, Holshouser, Carlton, Elstrom and Corwin are not entitled to recover damages without showing that they would have been promoted in February 1991 even had race not been considered. Defendant's also argue that any evidence offered to

show mental and emotional distress was not casually [sic] related to the constitutional violation. Defendant's seem to have missed the gist of the Court's November 14, 1994 Order which essentially held that plaintiffs may be entitled to damages for having been denied equal consideration in the promotion process which resulted from the Defendant's consideration of race as a factor in that process.

Defendant has previously acknowledged that a jury may award damages for mental and emotional distress under 42 U.S.C. § 1983 provided that there is proof of such injury actually caused by the violation. *Carey v. Piphus,* 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed. 2d 252 (1978). Furthermore, as this Court noted in its prior ruling on this issue

> the City of Charlotte's affirmative action program clearly produced competition on an uneven playing field. Such unequal competition on an uneven playing field. Such unequal competition can cause harm whether or not those forced to compete on less advantageous terms actually would have gained the benefit sought. For example, in the police promotion context, the racial preference requirement may have forced certain officers to make disagreeable, bothersome or unpleasant career decisions such as leaving the force, seeking transfers within the department or transfers to other police departments in order to gain the responsibility and rewards of promotion in a timely and fair process where a certain percentage of the limited promotion slots are not given to less qualified minority candidates.

The Court further held that the injury in this case stems directly from

> the Police Department's decision not to reach certain qualified and eligible candidates for consideration for promotion, (in other words, eligibility to compete for promotion), for all 21 promotion slots, simply because of

> their race. Plaintiffs were denied the right to compete on an equal footing, not as against other members of the discriminated class but as against the preferentially treated class. The Court recognizes that the plaintiffs have no constitutionally derived right to be promoted to sergeant. But they do have a federal constitutional right to equal protection which mandates equal consideration for public service promotions disqualifications, *See Turner v. Fouche,* 396 U.S. 346, 362, 90 S.Ct. 532, 541, 24 L.Ed.2d 567 (1970).

In sum, this Court held that

> the City of Charlotte's promotion process denied certain officers the opportunity to compete for a fixed percentage of the promotion slots based solely on their race. Here, the plaintiffs need only demonstrate that they were eligible to compete for promotion to sergeant and that a discriminatory policy prevented them from doing so on an equal basis. Accordingly, the Court finds that the Plaintiff's have demonstrated an "injury in fact" in that each plaintiff had qualifications superior to those of the black candidates selected and yet they were not considered on equal footing with those officers. The law is clear that, pursuant to 42 U.S.C. § 1983, plaintiffs are entitled to recover compensatory damages, including mental and emotional distress, for violations of their constitutionally protected rights which have caused injury. *Carey v. Piphus,* 435 U.S., at 263-264.

It is undisputed that the plaintiffs were subjected to an unconstitutional selection procedure and, as a matter of law, the Court previously held that the plaintiff need not demonstrate that they would have been promoted. *Regents of University of California v. Bakke,* 438 U.S. 265, 280, 98 S.Ct. 2733, 2743, 57 L.Ed.2d 750 (1978); *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida,* ___ U.S. ___, 112 S.Ct. 2297

(1994).

At trial each plaintiff testified how being subject to the unconstitutional procedure caused him injury. Such evidence, if believed by the jury, is sufficient to support an award of damages. This Court cannot weigh evidence, pass on credibility of the witnesses, or substitute its judgment for that of the jury, but rather, the Court must view the evidence and draw all legitimate inferences in light most favorable to the plaintiff. *See Smith Machinery Co., Inc. V. Jenkins,* 654 F.2d 693 (10th Cir. 1981); *Nuckoles v. F.W. Woolworth Co.,* 248 F.Supp 164 (D.C.Va. 1965). Accordingly, the Court finds the rationale of its previous ruling requires that the current motion similarly be denied.

NOW, THEREFORE, IT IS ORDERED that the Defendant's renewed motion for judgment be, and hereby is DENIED.

This the 23rd day of January 1995.

/s/ Robert D. Potter
Robert D. Potter
Senior United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-1263

DARRELL A. PRICE; DAVID H. HOLLAND; ROBERT A. HOLL; OSWALD D. HOLSHOUSER; RAYMOND T. CARLTON; S. VANCE ELSTROM; MARK E. CORWIN,
Plaintiffs-Appellees,
and
RONALD M. HAYES; RANDY HAGLER,
Plaintiffs,
v.
CITY OF CHARLOTTE, NORTH CAROLINA,
Defendant-Appellant,
and
NORTH STATE LAW ENFORCEMENT OFFICERS ASSOCIATION,
Defendant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Robert D. Potter, Senior District Judge.
(CA-91-158-C-C-P)

Argued: April 1, 1996

Decided: September 3, 1996

Before ERVIN, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Williams wrote the opinion, in which Judge Ervin and Judge Niemeyer joined.

COUNSEL

ARGUED: Frank Lane Williamson, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina, for Appellant. Louis L. Lesesne, Jr., LESESNE & CONNETTE, Charlotte, North Carolina, for Appellees. ON BRIEF: Jim D. Cooley, WOMBLE, CARLYLE, SANDRIDGE & RICE, Charlotte, North Carolina, for Appellant.

OPINION

WILLIAMS, Circuit Judge:

Appellees, seven white police officers, sued Appellant, the City of Charlotte, North Carolina, pursuant to 42 U.S.C.A.§ 1983 (West 1994), contending that promotions practices for advancement in the Charlotte Police Department violated the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, *see Hayes v. City of Charlotte*, 802 F. Supp. 1361 (W.D.N.C. 1992), and enjoined the City from employing any race-based criteria in reaching its employment decisions; we affirmed in part, *see Hayes v. North States Law Enforcement Officers Assoc.*, 10 F.3d 207 (4th Cir. 1993). While we affirmed with respect to liability, we remanded the case to the district court to limit the scope of the injunction and to resolve issues stayed during the appeal. On remand, the district court enjoined the City from using unlawful racial preferences regarding promotions to sergeant within the police department, and a jury awarded each Appellee $3,000 in compensatory damages for his injury in being subjected to the unconstitutional promotions practice.[1] Accordingly, the

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[1]None of the Appellees asserted a denial of promotion, and the City did not appeal awards of

district court entered judgment in Appellees' favor, denying the City of Charlotte's motions for judgment as a matter of law, *see* Fed. R. Civ. P. 50.

In this appeal, we must decide the propriety of awarding compensatory damages for Appellees' emotional distress flowing from the knowledge that the City excluded them from consideration for promotion to sergeant because of their race. Contending that Appellees would not have been promoted regardless of their race, the City contends that the district court erred in ruling that Appellees have standing to sue to recover compensatory damages. Additionally, the City posits that the evidence is insufficient to support the award of compensatory damages for Appellees' emotional distress. We conclude that Appellees have standing to sue to recover compensatory damages for emotional distress, but that the evidence is insufficient to support the verdict. Accordingly, we affirm in part and reverse in part.

I.

The facts are recited in *Hayes*, and we need address them only briefly here. In February 1991, the City promoted twenty-one police officers from patrol officer to police sergeant. Police Chief D.R. Stone determined that four of the twenty-one promotions would be awarded exclusively to African-Americans, regardless of the ranking on the promotions roster. The first eighteen promotions were awarded based on ranking, but only one of the promoted officers was African-American. In order to meet his quota of promoting four African-Americans to police sergeant, Chief Stone disregarded qualified white applicants for the remaining three

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compensatory damages to plaintiffs who were denied promotions because of their race. Appellees here are police officers who would not have been promoted regardless of a racially discriminatory promotions practice.

promotions and selected three African-American applicants, whose rankings on the promotions roster were twenty-nine, sixty-two, and seventy-four, respectively. All seven Appellees outranked candidates sixty-two and seventy-four, as did forty-one other white applicants. A substantial number of white officers who were not promoted had rankings superior to those of any of the Appellants. Even if an invidious factor -- the race of each candidate -- had not entered the promotions calculus, Appellees would not have been selected for promotion to sergeant.

On remand, Appellees asserted claims of emotional distress, seeking compensatory damages. The City unsuccessfully sought summary judgment respecting the emotional distress claims, contending that their roster rankings did not qualify them for promotion to police sergeant, and they thus were not entitled to individual relief in the form of damages. Consequently, the issue of individual relief went to trial. At trial, Appellees sought to prove their claims of emotional distress by testifying that they experienced degradation and betrayal as a result of the City's unlawfully discriminatory promotions policy. Appellees' evidence of their emotional distress consisted exclusively of their own testimony. According to Appellees, they "had played by the rules," but the City "deceived" them by not basing its promotions on grounds of competence.

At the close of Appellees' case-in-chief, and again at the close of the evidence, the City moved unsuccessfully for judgment as a matter of law pursuant to Rule 50. A jury returned a verdict in favor of each Appellee for $3,000 compensatory damages. Following entry of judgment, the City again unsuccessfully moved for judgment as a matter of law. Thereafter, the City appealed both from the final judgment and the order denying its post-trial motion for judgment as a matter of law.

On appeal, the City advances two arguments regarding

compensatory damages. First, the City asserts that it is not liable for any dam- ages because Appellees are entitled solely to injunctive or declaratory relief. Second, the City posits that even if it is liable for compensatory damages, the evidence is insufficient to sustain the verdict. We address these arguments in turn.

II.

The City asserts first that Appellees lack standing to seek compensatory damages because they would not have been promoted to sergeant regardless of the unconstitutional racial criterion. According to the City, Appellees are not entitled to any damages because they suffered no compensable loss that can be satisfied by damages. A violation of equal protection is Appellees' sole injury, the City posits, and the remedy for such a violation is exclusively injunctive or declaratory relief. The City's position is that because there was only a "technical foul," Appellees are precluded from recovering damages.

Appellees contest this position, maintaining that the actual injury they suffered was their race-based exclusion from equal consideration for the promotion to sergeant, not the fact that they failed to obtain a promotion. According to Appellees, their injuries derive from the City's unconstitutional use of race to decide promotions in the police department, not from an ultimate denial of a promotion. Appellees' compensatory damages, therefore, are to redress the ignominy of denial of consideration for promotion solely because they are white.

Concluding that Appellees had standing to seek compensatory damages, the district court denied the City's motions for judgment as a matter of law on this basis. We review the district court's ruling de novo, *see Trades Corp. v. Guy Atkinson Co.*, 996 F.2d 655, 661 (4th Cir.), *cert denied*, 114 S. Ct. 443 (1993), and affirm.

We conclude that Supreme Court precedent forecloses the City's argument that Appellees are precluded from recovering any damages because they would not have been promoted

regardless of the unlawful promotions scheme. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court concluded that § 1983 "was intended to `[create] a species of tort liability' in favor of persons who are deprived of `rights, privileges, or immunities secured' to them by the Constitution." *Id.* at 253 (alteration in original) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). Thus, damages awarded pursuant to § 1983 often find their genesis in the common law of torts, and the gravamen of tort law is "*compensation for the injury caused to plaintiff by defendant's breach of duty.*" *Id.* at 255 (internal quotation marks omitted) (emphasis added in part). Thus, "damages are available under [§ 1983] for actions `found . . . to have been violative of . . . constitutional rights *and to have caused compensable injury . . . .*'" *Id.* at 255 (quoting *Wood v. Strickland*, 420 U.S. 308, 319 (1975)). In endorsing an award of damages, *Carey* explained that the courts must not lose sight of the fact that such a plaintiff suffered a constitutional violation, and the federal courts must provide a remedy for the wrong suffered. *See id.* at 266.

While *Carey* concluded that damages for emotional distress are available under § 1983, the Court held that for a plaintiff to recover more than nominal damages, his injury must have actually been caused by the challenged conduct, and the injury must be sufficiently proved:

> [W]e foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the [constitutional violation]. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In sum, then, although mental and emotional distress caused by the [constitutional violation] itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

Id. at 263-64. Extrapolating from the common law of torts, the *Carey* Court thus concluded that a constitutional violation is indeed compensable with damages for emotional distress, declining to relegate an otherwise undamaged plaintiff to equitable remedies.

In expounding on the propriety of compensatory damages, the *Carey* Court explained that compensatory damages for emotional distress must be attributed to the actual constitutional violation, as opposed to denial of the ultimate benefit, and must be proved by a sufficient quantum of proof demonstrating that the violation caused compensable injury. Thus, the Court observed that if the plaintiff's injury is caused by "a justified deprivation, including distress, [it] is not properly compensable under § 1983." *Id.* at 263. The injury, therefore, must flow from the actual constitutional violation. A plaintiff's failure to prove compensatory damages results in nominal damages, typically one dollar, *see id.* at 266-67, the rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation. *Carey*, therefore, teaches that compensatory damages for emotional distress are available for a constitutional violation, but must be attributed to the invidious discrimination, not to the deprivation of an ultimate benefit; to recover more than nominal damages, actual injury caused by the constitutional violation must be proved by sufficient evidence.

The Court reiterated the teachings of *Carey* in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). *Stachura* reaffirmed the conclusion that § 1983 is akin to tort law and that determining damages pursuant to § 1983 is governed by principles of the common law of torts, with the hallmark of these principles being one of compensation for actual injury. *See id.* at 307. In describing the types of injury for which compensatory damages may be recovered pursuant to § 1983, the *Stachura* Court observed that "out-of-pocket

loss and other monetary harms [and] `impairment of reputation . . . , personal humiliation, and mental anguish and suffering'" could be awarded. *Id.* at 306 (quoting *Gertz v. Robert Welch, Inc.*,, 418 U.S. 323, 350 (1974)). After explaining that damages for emotional distress can be recovered under § 1983, the Court reaffirmed *Carey* by stating that "`the basic purpose' of § 1983 damages is `*to compensate persons for injuries* that are caused by the deprivation of constitutional rights,'" *id.* (quoting *Carey*, 435 U.S. at 254), and to receive compensatory damages, a plaintiff's damages must be"grounded in determinations of plaintiffs' actual losses," *id.* at 307. Hence, *Stachura* reaffirmed the holding that the purpose of § 1983 is to compensate a plaintiff whose constitutional rights have been violated; to recover compensatory damages for such violations, a plaintiff must suffer actual, demonstrable injury.

The Court applied the principles of *Carey* and *Stachura* in *Northeastern Florida General Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993), in holding that the injury required to recover compensatory damages for a constitutional violation springs from the impermissible conduct of the Government in perpetrating invidious discrimination, not from the consequence of denial of plaintiff's ultimate goal. In *Northeastern*, contractors challenged a set-aside program that awarded black- and Hispanic-owned businesses construction work, regardless of whether such businesses submitted the lowest bid. *See id.* at 659. Asserting that the set-aside program violated the Equal Protection Clause of the Fourteenth Amendment, the contractors sued, seeking declaratory and injunctive relief. *See id.* Rather than address the merits of the contractors' suit, the Eleventh Circuit concluded that they lacked standing to challenge the set-aside program because they failed to demonstrate that but for the set-aside program, they would have obtained the contracts through successful bidding. *See id.* at 660.

Reversing the Eleventh Circuit, the Supreme Court concluded that the contractors possessed standing to sue. Analogizing from *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court concluded that the contractors possessed standing because the requisite injury was the inability to compete equally for contracts simply because the contractors were neither black nor Hispanic. *See id.* at 666-68. In *Bakke*, Bakke was denied admission to medical school because he was white, and the Court held that this denial constituted the requisite injury because Bakke was not "permit[ted] . . . to compete for all 100 places in the class simply because of his race." *Bakke*, 438 U.S. at 281 n.14. Thus, "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." *Id.* at 280-81 n.14. Just as Bakke suffered injury, the *Northeastern* Court held the contractors suffered injury in fact because they were denied equal protection:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern, 508 U.S. at 666. Specifically applied to set-aside pro- grams, the "`injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.*

Rounding out the *Carey-Stachura-Northeastern* trilogy for recovering damages based on a § 1983 equal protection claim is *Adarand Constructions, Inc. v. Pena*, 115 S. Ct. 2097 (1995). Adarand challenged a federal set-aside program that

awarded government contracts to businesses owned by minorities, regardless of whether the minority-owned business submitted the lowest bid, contending that this program violated the Equal Protection Clause. *See id.* at 2104. In addition to seeking declaratory and injunctive relief to prevent future discrimination, Adarand sought compensatory damages for losing a contract that went to a hispanic-owned business. The Government asserted that the program was constitutional and asserted further that Adarand lacked standing to sue for future relief. *See id.* Holding that Adarand had suffered injury in fact with respect to both compensatory and declaratory or injunctive relief, the Supreme Court rejected the Government's contention:

> [W]e must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract . . . . But as we explained [previously,] the fact of past injury "while presumably affording [the plaintiff] standing to claim damages . . ., does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future.

Id. (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)) (second alteration in original). In reaching the conclusion that Adarand had standing to maintain the suit, the Court relied on *Northeastern*, specifically rejecting the Government's contention that"Adarand need . . . demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a `discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" *Id.* (quoting *Northeastern*, 113 S. Ct. at 2304).

We applied these principles in *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978) (per curiam) in the context of a due process violation. Burt was terminated from her position as a teacher, but the termination was effected without affording Burt due

process. Pursuant to *Carey*, we remanded the case to the district court to determine whether Burt could establish compensatory damages for her § 1983 claim. In remanding, we observed that in order to recover such damages, Burt must prove that her injury flowed from the denial of due process, not from termination of her teaching position, the denial of her ultimate benefit. *See id.* at 616. In remanding to determine the propriety of awarding compensatory damages, we explained that"to recover more than nominal damages" for emotional distress, a plaintiff "must also prove that the procedural deprivation caused some independent compensable harm." *Id.* at 616. Likewise, our sister circuits have applied the rationale of *Carey* and its progeny to sustain compensatory damages awarded pursuant to § 1983. *See, e.g., Miner v. City of Glens Falls*, 999 F.2d 655, 663 (2d Cir. 1993) (sustaining an award of compensatory damages based on emotional distress claim for a due process violation); *United States v. Balistrieri*, 981 F.2d 916, 933 (7th Cir. 1992) (rejecting the very argument that the City advances here and affirming an award of damages for emotional distress under the Fair Housing Act), *cert. denied*, 510 U.S. 812 (1993).

Applying these precedents, we conclude that Appellees have standing to recover compensatory damages, provided their injuries resulted from the constitutional violation and are sufficiently proved. *Carey* and its progeny demonstrate that the injury Appellees suffered is the ignominy and illegality of the City's erecting a racial bar to promotions, and more importantly, that this injury can be compensable by damages, not merely declaratory or injunctive relief. Similar to the plaintiffs in *Bakke*, *Northeastern*, and *Adarand*, Appellees were not competing on a level playing field -- the cards were unlawfully stacked against them -- and this denial of equal protection constitutes injury in fact capable of supporting compensatory damages. These precedents also hold that Appellees may be entitled to compensatory damages for

emotional distress, the precise type of injuries claimed here. In accordance with these precedents, however, Appellees must establish that their injury is grounded in the denial of equal protection, not their lack of promotions. Provided, therefore, that the jury awarded Appellees damages predicated on their unconstitutional treatment, rather than the ultimate deprivation of promotion to sergeant, Appellees can recover compensatory damages for emotional distress, the issue to which we now turn.

III.

At trial, some Appellees attempted to prove their compensatory damages for emotional distress by testifying that they suffered ignominy as a result of the City's invidious discrimination and the consequences this discrimination visited on their lives. Some Appellees testified in the most generic of terms that they were "humiliated," "betrayed," and "deceived" by the City's invidiously discriminatory promotions policy. In mustering the evidence of their compensatory damages, Appellees proffered only their vague, conclusory testimony, but despite the ephemeral nature of this evidence, the jury awarded each Appellee $3,000 in compensatory damages for his emotional distress.

Challenging the amount of the award of compensatory damages with respect to each Appellee, the City posits that the evidence is insufficient as a matter of law to sustain the verdict. According to the City, the evidence completely lacks any probative quality and is entirely speculative. Given these fatal flaws, the City argues that on no principled basis can the award of compensatory damages be sustained. The district court erred, therefore, the City reasons, in denying its motions for judgment as a matter of law.

Appellees advance two arguments respecting the sufficiency of the evidence. First, they maintain that we are procedurally barred from reviewing the sufficiency of the evidence because the City failed to raise and preserve

adequately this issue in its Rule 50 motions. Second, even disregarding the procedural bar to reviewing the sufficiency of the evidence to sustain the compensatory damages, Appellees assert that the evidence is adequate to sustain their modest awards. According to Appellees, therefore, the district court properly denied the City's motions for judgment as a matter of law. We address these arguments in turn.

A.

Traditionally the City is required to have raised the reason for which it is entitled to judgment as a matter of law in its Rule 50(a) motion before the case is submitted to the jury and reassert that reason in its Rule 50(b) motion after trial if the Rule 50(a) motion proves unsuccessful. *See Singer v. Dungan*, 45 F.3d 823, 928-29 (4th Cir. 1995). Thus, a Rule 50(a) motion is a prerequisite to a Rule 50(b) motion because the City must apprise the district court of the alleged insufficiency of Appellees' suit before the case is submitted to the jury. *See Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1058 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976). Hence, if the City completely failed to question the sufficiency of the evidence supporting compensatory damages in its Rule 50 motions, absent plain error, we would "not review the sufficiency of the evidence because implicit in the [City's] failure to move for judgment as a matter of law is the belief that the evidence created a jury issue, and the [City] `should not be permitted on appeal to impute error to the trial judge for sharing that view.'" *Bristol Steel & Iron Works. v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994) (quoting *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509, 511 (5th Cir. 1970)).

Our review of the record compels us to conclude that the City sufficiently raised and preserved the sufficiency issue for appellate review. First, in its Rule 50(a) motion at the close of Appellees' case-in-chief, the City contended "there's no legally sufficient evidentiary basis for a reasonable jury to

find for the plaintiff on any of the issues brought before the court." (J.A. at 196.) Also, in arguing its Rule 50(a) motion, the City specifically reiterated that "there's really been no evidence from which a reasonable jury could conclude that they did, in fact, suffer mental and emotional distress that can be related to the constitutional violation they complained of." (J.A. at 199.) Denying the City's motion, the district court concluded that the sufficiency issue was raised: "I believe there is sufficient [evidence] -- in the light most favorable to the plaintiff to go to the jury." (J.A. at 203.) We likewise conclude that the sufficiency issue was assuredly raised, given that we have reviewed sufficiency challenges under less compelling circumstances. *See Singer*, 45 F.3d at 828 (reviewing an improperly raised sufficiency challenge under Rule 50 and excusing the impropriety because the district court stated that there was sufficient evidence to send the case to the jury). We find no merit, therefore, in Appellees' contrary contention; accordingly, we conclude that we may review the sufficiency of the evidence.

B.

1.

In reviewing a Rule 50 determination, our review is circumscribed with respect to any facts the jury found, but plenary with respect to any legal conclusions underlying the verdict:

> Judgment as a matter of law is proper "when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A James W. Moore, *Moore's Federal Practice* ¶ 50.07[2], at 50-76 (2d ed. 1994). The movant is entitled to judgment as a matter of law "if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof." *Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994) (internal quotation marks omitted). While our

> review of this motion is plenary, it is also circumscribed because we must review the evidence in the light most favorable to [the nonmoving party]. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994).

Singer, 45 F.3d at 826-27. Because federal courts do not directly review jury verdicts, constrained, as we are, by the Seventh Amendment, the City bears a hefty burden in establishing that the evidence is not sufficient to support the awards. *See Bristol Steel & Iron Works*, 41 F.3d at 186-87. In determining whether the evidence supports the awards, we review the evidence, and all reasonable inferences to be drawn therefrom, in favor of Appellees. *See Malone v. Microdyne Corp.*, 26 F.3d 471, 475 (4th Cir. 1994). Recognizing that we may not substitute our judgment for that of the jury or make credibility determinations, *see Murdaugh Volkswagen, Inc. v. First Nat'l Bank*, 801 F.2d 719, 715 (4th Cir. 1986), if there is evidence on which a reasonable jury may return verdicts in favor of Appellees, we must affirm, *see Wyatt v. Interstate & Ocean Transp.*, 623 F.2d 888, 891 (4th Cir. 1980). While we are compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, *see Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991), we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty to reverse the jury verdicts if the evidence cannot support it, *see Singer*, 45 F.3d at 829.

2.

While *Carey* concluded that compensatory damages for emotional distress are compensable under § 1983, such damages may not be presumed from every constitutional violation, but must be proven by competent, sufficient evidence. *See Carey*, 435 U.S. at 262-63 & n.20. The emotional distress, moreover, must find its genesis in the actual violation, not in any procedural deficiencies that accompanied the violation, *see id.* at 263, because damages

for violations of civil rights are intended to "*compensate injuries* caused by the [constitutional] deprivation," *id.* at 265 (emphasis added). *See also Stachura*, 477 U.S. at 308 (holding that there is no right to damages other than nominal damages for violation of a constitutional right unless actual injury is proven). Consequently, Appellees are required "to convince the trier of fact that [they] actually suffered distress because of the [equal protection violation] itself," *Carey*, 435 U.S. at 263, and failure to succeed in establishing "actual injury" based on sufficient evidence will result in the award of only nominal damages, typically one dollar, *id.* at 266-67. In expounding on the availability of compensatory damages for emotional distress for a constitutional violation, *Carey* observed that such damages are "customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff," *id.* at 263-64, and such injury "may be evidenced by one's conduct and observed by others," *id.* at 264 n.20. *Carey*, therefore, requires evidence of emotional distress sufficient to convince the trier of fact that such distress did in fact occur and that its cause was the constitutional deprivation itself and cannot be attributable to other causes. A verdict supported by competent evidence, therefore, is a prerequisite to recover compensatory damages for a constitutional violation. This remedial scheme comports with *Carey*'s holding that remedies for constitutional violations "should be *tailored* to the interests protected by the particular right in question," *Carey*, 435 U.S. at 259 (emphasis added), which, of course, comports with the *Carey* Court's grounding its decision for analyzing constitutional violations in the common law of torts, *see id.* at 258-59, the body of law to which we now turn.

Traditionally, common law courts have been reticent regarding compensatory damages for emotional distress in the absence of physical injury. *See* W. Page Keaton et al., *Prosser & Keaton on The Law of Torts* Ch. 2, § 12, at 64

(5th ed. 1984). This reticence originated from "the elementary principle that mere mental pain and anxiety are too vague for legal redress," *Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916) (internal quotation marks omitted). Not only is emotional distress fraught with vagueness and speculation, it is easily susceptible to fictitious and trivial claims, *see Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2408 (1994), and the intrusion of the federal courts into proscribing societal etiquette, *see Pope v. Rollins Protective Servs. Co.*, 703 F.2d 197, 204 (5th Cir. 1983). Empathizing with the trepidation of common law courts in analyzing such claims, the federal courts have recognized that emotional distress claims arising from constitutional violations are not immunized from the nebulous, speculative character that plagues their common law analogues. *See, e.g., Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985) (noting the paucity of evidence in reviewing damages for a § 1981 claim based on emotional distress and noting further that the proffered evidence was so general and vague that remittitur was required); *Cohen v. Board of Educ., Smithtown Cent. Sch. Dist.*, 728 F.2d 160, 162 (2d Cir. 1984) (holding that a claim of emotional distress supported only by the plaintiff's testimony could not support an award of "substantial damages"); *Dougherty v. Barry*, 604 F. Supp. 1424, 1443 (D.D.C. 1985) (ruling that damages for emotional distress based on a constitutional violation could not be awarded for want of exactitude). Guided by these principles, we analyze the specific claims presented by this appeal.

Here, as we set out *infra* at 21-26, the only evidence of Appellees' emotional distress was their own testimony. A survey of the case law reveals that a plaintiff's testimony, standing alone, may support a claim of emotional distress precipitated by a constitutional violation. *See, e.g., Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Rakovich v. Wade*, 819 F.2d 1393, 1399 & n.6 (7th Cir.)

(*Rakovich I*) *vacated on other grounds*, 850 F.2d 1179 (7th Cir. 1987) (en banc), *on reh'g*, 850 F.2d 1180 (7th Cir.) (*Rakovich II*) (en banc), *cert. denied*, 488 U.S. 968 (1988); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Cohen*, 728 F.2d at 162; *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Dougherty*, 604 F. Supp. at 1443; *see also see also* [sic] *Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29, 34-36 & n.3 (3d Cir. 1994) (generally endorsing this view, but specifically holding that medical evidence was not necessary to prevail on a claim for emotional distress); *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983) (holding that plaintiff's own testimony of emotional distress was sufficient to warrant an evidentiary hearing and award of compensatory damages).

Equally, however, the case law reveals that courts scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony. *See, e.g., Biggs*, 892 F.2d at 1304 (remitting compensatory damages based on emotional distress claim for want of sufficient evidence); *Spence*, 806 F.2d at 1201 (affirming remittitur of compensatory damages because plaintiff's testimony was too speculative to support the verdict of $22,060); *Cohen*, 728 F.2d at 162 (holding that plaintiff was not entitled to recover "any substantial sum" based on emotional distress because proof was so lacking); *Nekolny*, 653 F.2d at 1172-73 (reversing a damages award for emotional distress for a First Amendment violation because the evidence was insufficient to support it); *see also Hetzel v. County of Prince William*, No. 95-1935, 1996 WL 386464, at *2 (4th Cir. July 11, 1996) (reversing and remanding excessive compensatory damages award in a Title VII and § 1983

suit where it was based "almost exclusively" on plaintiff's conclusory testimony); *Morgan v. Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1459 (10th Cir. 1993) (reversing a $5000 verdict for emotional distress brought under the Fair Housing Act because the verdict was not supported by substantial evidence). If, as in the instant appeal, "the injured part[ies] provide[ ] the sole evidence [of mental distress, they] must reasonably and sufficiently explain the circumstances of [their] injury and not resort to mere conclusory statements," *Biggs*, 892 F.2d at 1304 (internal quotation marks omitted) (third alteration in original), and seriatim recitations of "depression" or "hurt feelings" as evidence of emotional distress offered by the plaintiff fail to meet this standard, *see Hetzel*, 1996 WL 386464, at *4; *Morgan*, 985 F.2d at 1459; *Nekolny*, 653 F.2d at 1172-73. A plaintiff asserting a constitutional violation, therefore, must produce evidence of *"demonstrable* emotional distress," *see Rakovich I*, 819 F.2d at 1399, or "demonstrable mental anguish," *George v. Bourgeois*, 852 F. Supp. 1341, 1353 (E.D. Tex. 1994) (dicta). In addition, Appellees must demonstrate a causal connection between the constitutional violation and their demonstrable emotional distress to recover compensatory damages. *See Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977). Appellees, therefore, cannot automatically recover compensatory damages for emotional distress simply because they proved a violation of a constitutional right. Thus, while a plaintiff's testimony, standing alone, can support an award of compensatory damages, the evidence of the emotional distress must be demonstrable, genuine, and adequately explained.

Various courts have applied these precepts to reverse or remand compensatory damages awards. For instance, in *Biggs*, Biggs, who was discharged and brought a First Amendment claim against the Village of Dupo, was told that he behaved in a manner "'unbecoming a police officer,'" and "was unworthy to represent [the defendant,] Village of

Dupo," *Biggs*, 892 F.2d at 1305. According to Biggs, these statements caused him emotional distress, and in presenting the evidence of his emotional distress, he "testified that he was affected emotionally by being fired, and that he was concerned over 'the idea of my family going through it.'" *Id.* at 1304 (quoting testimony). Except for his own conclusory testimony, Biggs "made no offer of proof, and no other direct testimony concerning mental distress was introduced." *Id.* The Seventh Circuit vacated and remanded Biggs's compensatory damages award of $60,000 unless Biggs accepted a remittitur of $29,970 so that he recovered only his lost wages. *See id.* at 1305. According to the court, Biggs had failed "reasonably and sufficiently [to] explain the circumstances of his injury," and therefore his conclusory, inadequate testimony could not support compensatory damages for emotional distress. *Id.* at 1304 (internal quotation marks omitted). Because Biggs's testimony did not show "*demonstrable* emotional distress," *id.* at 1305 (internal quotation marks omitted), but at most consisted of "mere conclusory statements," *id.* at 1304 (internal quotation marks omitted), the court held that Biggs's evidence of his emotional distress was insufficient to support the verdict. *See id.* at 1305.

In *Ramsey*, the Seventh Circuit again addressed the issue of demonstrable evidence of injury in the context of an excessive compensatory damages award. A jury awarded Ramsey $75,000 in compensatory damages for emotional distress based on racial discrimination. *Ramsey*, 772 F.2d at 1313. Ramsey's evidence of his emotional distress consisted of his testimony and that of a former colleague, Arthur Freeze, and Ramsey's physician, Dr. Robert Wells. *See id.* According to Ramsey, "he felt humiliated," "'about as low as any man could feel,'" "'slap[ped] . . . in the face,'" and "'insulted.'" *Id.* (quoting testimony) (alteration in original). Likewise, Freeze testified that Ramsey "felt 'disgusted'" as a result of his being singled out for disparate discipline

ostensibly based on Ramsey's race. *Id.* (quoting testimony). Thus, Ramsey and Freeze testified regarding the violation, but not about any demonstrable evidence of emotional distress. According to Dr. Wells,[2] Ramsey "was concerned about finding a job," explaining that Ramsey's unemployment "'preyed on him psychologically because he doesn't like [the] position his unemployment has put him in.'" *Id.* (quoting testimony) (alteration in original). Despite testifying that Ramsey's unemployment was a source of concern, Dr. Wells never "treated [Ramsey] for depression or prescribed any drugs for emotional distress." *Id.* After observing the "paucity of references to any emotional harm that [Ramsey] suffered as a result of defendant's discrimination" and "the absence of any evidence that [Ramsey] was treated for emotional harm or that he became depressed for any sustained period of time," the court concluded that the $75,000 compensatory damages award was "excessive compensation for the humiliation that [Ramsey] experienced," *id.*, and accordingly vacated and remanded the damages award, conditional on Ramsey's accepting remittitur of $35,000 for his emotional distress, *id.* at 1314. In reaching this holding, the court relied on cases explaining that compensatory damages awards for constitutional violations require that the plaintiff demonstrate some objective manifestation of his emotional distress, such as "'sleeplessness, anxiety, embarrassment and depression,'" *id.* at 1313-14 (quoting *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983)), or instances "in which the

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[2]According to the *Ramsey* court, Dr. Wells treated Ramsey principally for a lung condition several years before the litigation and performed for Ramsey. As far as the opinion reveals, Ramsey did not seek treatment from Dr. Wells for any afflictions stemming from the constitutional violation.

plaintiff suffered `seventeen months of incessant humiliation, harassment, and feelings of isolation,'" *id.* (quoting *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984)).

Similarly, in *Nekolny*, the Seventh Circuit reversed compensatory damages awards for emotional distress based on the plaintiffs' testimony that they were "'very depressed,'" "'a little despondent and [lacking] motivation,'" and "'completely humiliated.'" *Nekolny*, 653 F.2d at 1172 (alteration in original). According to the court, this conclusory testimony was "insufficient to constitute proof of compensable mental or emotional injury" because "[a] single statement by a party that he was `"depressed,"' `"a little despondent,"' or even `"completely humiliated,"' . . . is not enough to establish injury . . . ." *Id.* at 1172-73. In reaching this conclusion, the court considered the facts and circumstances surrounding the challenged action, annual physicals opining that they were not very egregious. *See id. Nekolny*, therefore, teaches that evidence to support a compensatory damages award based on a constitutional violation must be explained with competent testimony, not merely be a recital that emotional distress resulted from a constitutional violation; the injury must be demonstrable and capable of articulation.

Echoing the concerns of *Biggs*, *Ramsey*, and *Nekolny*, the Second Circuit in *Cohen* affirmed the district court's awarding no damages for a claim of emotional distress for a due process violation because the only evidence consisted of the plaintiff's own testimony, which is naturally "subjective" and subject to "vagueness." *Cohen*, 728 F.2d at 162. In reaching this ruling, the Second Circuit noted that Cohen testified respecting psychiatric consultations, but proffered no objective evidence of his emotional distress. *See id.* The *Cohen* court's affirmance where subjective emotional distress is unsupported by objective evidence comports with the precept that any emotional distress be demonstrable.

Also demanding evidence of demonstrable emotional

distress to recover compensatory damages for a constitutional violation is the Third Circuit's decision in *Spence*. Spence brought a First Amendment claim against her employer, contending that her transfer had been in retaliation for voicing her opinion, and a jury awarded her $25,000 in compensatory damages. *See Spence*, 806 F.2d at 1199. Spence's evidence of her emotional distress "consisted chiefly of [her] own testimony that she was depressed and humiliated . . . and that she lost her motive to be creative." *Id.* at 1201. Specifically, "[t]here was no testimony that [Spence's] peers held her in any less esteem," nor was there evidence that Spence "suffered physically from her emotional distress or that she sought professional psychiatric counselling." *Id.* Not only did Spence offer no proof of physical or psychological injury, but she "suffered no loss of job or reduction in pay. Thus, she did not suffer emotional distress resulting from loss in income." *Id.* Given that Spence's evidence did not sufficiently explain her emotional distress, the Third Circuit concluded that "neither the circumstances nor the testimony established that there was `a reasonable probability, rather than a mere possibility, that damages due to emotional distress were in fact incurred as a result of [the challenged action].'" *Id.* (quoting district court order). Accordingly, for want of sufficient evidence of emotional distress, the court affirmed the remittitur of Spence's compensatory damages to $2940, thus compensating only Spence's actual damages for travel expenses and wage taxes. Comparable to *Biggs*, *Ramsey*, *Nekolny*, and *Cohen*, the *Spence* court explained that emotional distress for a constitutional violation must be sufficiently demonstrable and capable of articulation as a prerequisite to recover compensatory damages.

Recently, in *Hetzel*, we expressed our reservation regarding an excessive compensatory damages award for emotional distress pursuant to Title VII and § 1983. Asserting that she was discriminated against on the basis of sex and national

origin, Hetzel brought a variety of claims against her employer. *Hetzel*, 1996 WL 386464, at *1. A jury returned verdicts in favor of the employer, but found that Hetzel's superior, Police Chief Charlie Deane, retaliated against Hetzel for engaging in protected speech and awarded compensatory damages of $750,000 for emotional distress, which the district court remitted to $500,000. *See id.* Hetzel's evidence of her emotional distress "consisted almost exclusively of [her] own, brief conclusory statements." *Id.* at *2. In fewer than ten pages of transcript, she merely recited that she had "headaches, stress, trouble reading to her daughter, and problems with her family life as a result of [her employers'] actions." *Id.* In reversing and remanding the award of compensatory damages, we explained that while Hetzel's evidence of emotional distress entitled her to "minimal damages," *id.*, there was "insufficient evidence" to support an award of $500,000, *id.* at *3. Citing the paucity of evidence to support such an award, we observed that"Hetzel presented no evidence corroborating the existence of any of her supposed specific harms," "remain[ed] . . . in good standing with the police department," displayed "no observable injuries or physical ailments," and had "never once seen a doctor, therapist, or other professional, or even sought the counsel of a friend, to help her deal with her what is supposedly an enormous problem overshadowing all aspects of her life." *Id.* at *2.

Amalgamating these principles, we conclude that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation; however, the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages. In marshaling the

evidence necessary to establish emotional distress resulting from a constitutional violation, *Carey* instructs us that "genuine injury" is necessary. *Carey*, 435 U.S. at 264.

While the substance and content of testimony regarding a plaintiff's emotional distress are considered in awarding compensatory damages for emotional distress based on a constitutional violation, the federal courts examine other considerations in determining whether substantial evidence supports an award of compensatory damages for emotional distress. For instance, in affirming the remittitur of compensatory damages, the Third Circuit in *Spence* considered four factors: (1) the plaintiff did not lose the esteem of her peers; (2) the plaintiff suffered no physical injury as a consequence of her emotional distress; (3) the plaintiff received no psychological counseling; and (4) the plaintiff suffered no loss of income. *See Spence*, 806 F.2d at 1201. The Second Circuit followed *Spence* and considered the same factors in reviewing an award for a like claim challenged on sufficiency grounds. *See Miner*, 999 F.2d at 663. In *Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1265-66 (10th Cir. 1995), the Tenth Circuit contemplated the following factors in analyzing a claim for emotional distress premised on a constitutional violation: (1) the degree of emotional distress; (2) the context of the events surrounding the emotional distress; (3) the evidence tending to corroborate the plaintiff's testimony; (4) the nexus between the challenged conduct and the emotional distress; and (5) any mitigating circumstances. Various courts also consider medical attention, if any, that the plaintiff received as a result of the emotional distress, *see, e.g.*, *Hetzel*, 1996 WL 386464, at *2; *Fitzgerald*, 68 F.3d at 1266; *Miner*, 999 F.2d at 663; *Ramsey*, 772 F.2d at 1313-14, and psychological or psychiatric treatment, if any, that the plaintiff received, *see, e.g.*, *Hetzel*, 1996 WL 386464, at *2; *Spence*, 806 F.2d at 1201; *Ramsey*, 772 F.2d at 1313. All of these factors aid triers of fact in determining the

propriety of awarding compensatory damages for emotional distress, as well as appellate courts in reviewing sufficiency challenges to such awards.

In this appeal, we express the same trepidation as our sister circuits regarding conclusory testimony with respect to the sufficiency of the evidence supporting an award of compensatory damages based on emotional distress for a constitutional violation. We conclude that the evidence is not sufficient to support the awards and hence reverse. Here, the evidence simply fails to show any demonstrable emotional injury; the evidence of Appellees' emotional distress consisted exclusively of their own conclusory statements, which did not indicate how their alleged distress manifested itself. For instance, in articulating his emotional distress in testimony that spanned only a few pages of transcript, Officer Holl testified that he felt "betray[ed]," "[e]mbarrassed," and "[d]egraded . . . and passed over." (J.A. at 118.) Officer Holl stated, however, that he did not "change [his] procedures whatsoever," with respect to performing his duties. (J.A. at 119.)

Officer Corwin, whose pertinent testimony was approximately one and one-half pages in length, testified that he "guess[ed]" he felt "betrayed," "disappointed and embarrassed," explaining that he "wasn't aware that race was going to play any part" in the promotions practice. (J.A. at 124.) While testifying that he was betrayed, disappointed, and embarrassed, Officer Corwin also testified that he "tried not to let it affect me at all." (J.A. at 124.) Moreover, on cross-examination, Officer Corwin testified that he did not know his rank on the promotions roster.

In a like vein, Officer Elstrom testified that he felt "devastated" by the City's "perpetrat[ing its] deceit," explaining that he felt "used as a pawn," and "betrayed, lied to, used." (J.A. at 131, 134.) According to Officer Elstrom, he simply was unsure whether he had faith in his superiors in

the police department because they told him there was no invidious discrimination regarding promotions, when, in fact, there was. Summarizing his claim, Officer Elstrom stated that his "self-esteem went from rather high. My confidence was up and all of a sudden it just drops." (J.A. at 134.) He did not testify that any consequence resulted from his drop in self-esteem.

Officer Holshouser stated that he had "been lied to [and] . . . deceived. [He felt] like a lot of [his] time, a lot of [his] personal time, personal stress, personal stress on [his] family" was a consequence of the City's unconstitutional conduct. (J.A. at 175.) According to Officer Holshouser, he "lost all respect for Chief Stone" and "for a lot of people in the department that were in the upper echelon of the command." (J.A. at 167-68.) More revealing is the fact that on cross-examination, Officer Holshouser stated that had he known that race played a role in the promotions practice, he would not have "spen[t his] own money to buy the books [for preparing for the promotions exam]," "spen[t his] own personal time to read the material," or "spen[t his] own personal time to participate in training that the department provided." (J.A. at 180.) These conclusory statements are the only evidence of these officers' emotional distress.

Analyzing these claims, we hold that the compensatory damages cannot stand. Here, Officers Holl, Corwin, Elstrom, and Holshouser never offered evidence of any need for medicine, *see Hetzel*, 1996 WL 386464, at *2; *Ramsey*, 772 F.2d at 1313; physical symptoms, *see Spence*, 806 F.2d at 1201; *Ramsey*, 772 F.2d at 1313; psychological disturbance or counseling, *Hetzel*, 1996 WL 386464, at *2; *Spence*, 806 F.2d at 1201; loss of income or pecuniary expense, *see id.*; a description of their emotional distress, *see Biggs*, 892 F.2d at 1304; or how their conduct changed or if others observed their conduct change, *see Carey*, 435 U.S. at 264 n.20. Also conspicuously absent from their evidence is any corroboration

of their emotional distress or any manifestation it may have assumed. *See Hetzel*, 1996 WL 386464, at *2 (observing that the plaintiff displayed "no observable injuries or physical ailments"). Also, as opposed to *Hetzel*, in which there were ten pages of testimony regarding the emotional distress, here, there was often less testimony. Given this paucity of explanation or description regarding their emotional distress, we conclude that Appellees' evidence fails to show "genuine injury" evidenced by "nature and circumstances of the wrong and its effect" under *Carey*. In addition, Appellees' evidence fails to exhibit any of the factors that the *Spence, Miner*, and *Fitzgerald* courts considered in assessing emotional distress claims for constitutional violations. Here, we are confronted with the bald, conclusory assertions that Appellees felt betrayed and deceived, but there was no evidence concerning any demonstrable injury suffered. Such vague, conclusory statements do not constitute sufficient evidence, *see Biggs*, 892 F.2d at 1304-05; *Nekolny*, 653 F.2d at 1172-73, and we reverse the compensatory damages awards with respect to Officers Corwin, Holl, Elstrom, and Holshouser. In our opinion, this testimony does not satisfy the requirement that Appellees show actual injury by sufficient evidence; their injuries, if any, are properly characterized as disappointment with their superiors, rather than emotional distress. Accordingly, the compensatory damages awards rendered in favor of Officers Corwin, Holl, Elstrom, and Holshouser are reversed.

In reaching our conclusion, we do not hold that compensatory damages for emotional distress can never be awarded based exclusively on a plaintiff's testimony, *see, e.g.*, *Hetzel*, 1996 WL 386464, at *2; *Rakovich I*, 819 F.2d 1399 & n.6; *Chalmers*, 762 F.2d at 761; *Williams*, 660 F.2d at 1272-73, but we simply hold that in this case, the testimony was insufficient to support an award of damages. Here, these officers did not "reasonably and sufficiently explain the circum- stances of [their] injury," but rather "resort[ed] to

mere conclusory statements," which cannot support an award of compensatory damages. *See Biggs*, 892 F.2d at 1304. Because these Appellees did suffer a constitutional violation, but failed to prove emotional distress warranting compensatory damages, we award them nominal damages in the sum of one dollar each. *See Carey*, 435 U.S. at 266 (sua sponte awarding one dollar in nominal damages because civil rights plaintiffs failed to prove actual damages); *Cohen*, 728 F.2d at 162 (stating that the "better practice" is to award one dollar nominal damages for a constitutional violation if the plaintiff's evidence cannot support "any substantial sum" for damages and sua sponte awarding such nominal damages on appeal).

The compensatory damages awarded to Officers Carlton, Price, and Holland are likewise problematic because in our view, the evidence these Appellees provided tends to support the conclusion that their damages arose not from emotional distress as a consequence of invidious discrimination, but rather from the City's failure to promote them. Because none of the Appellees would have been promoted even in the absence of a violation, however, they are not entitled to damages due to the denial of promotions.

For example, Officer Carlton, whose testimony is roughly four pages in length, related his emotional distress to the fact that he was the victim of the City's quota system: Having achieved exceptional ratings, he felt that he should have been promoted to sergeant, yet was not. For instance, Officer Carlton stated that he felt "slapped . . . in the face" because, according to him, he was "more qualified to be a sergeant" than some of those who were promoted to sergeant. (J.A. at 155.) Despite his supposed emotional distress, Officer Carlton testified that he continued to perform his duties just as he had prior to this litigation, explaining that he was "a professional." (J.A. at 156.)

Officer Price's testimony reveals that he was upset that

black officers who scored lower on the evaluations criteria for promotion to sergeant were promoted, while he was not, simply because he was Caucasian. According to Officer Price, he "d[idn't] know what to believe. And after a while it kind of takes the wind out of anything that you're doing." (J.A. at 161.) Summarizing his testimony, Officer Price stated that the City's conduct was "a giant step backwards" because "[t]here just seems to be a problem with the fact that [the promotions practice] applies to one race and not to the other. And I take that very seriously." (J.A. at 161.)

Officer Holland's testimony establishes the same principle, and hence the same infirmity. According to Officer Holland, he was displeased by the fact that different criteria applied to different races regarding promotions, specifically asserting that he should be compensated for the time spent in preparing for the promotions exam. Explaining his emotional distress, Officer Holland stated that he "felt kind of like a patsy" because "one set of rules applied to white officers," but if "the need arose or the testing procedure didn't deliver the expected number of minority candidates, a new set of rules were imposed." (J.A. at 184.) On cross-examination, Officer Holland stated that he should be compensated for preparing for the promotions examination, thereby establishing that at least part of his damages were not based on invidious discrimination. Officers Carlton, Price, and Holland cannot separate their claims of emotional distress from their failure to receive promotions; accordingly, they cannot recover compensatory damages.

Even accepting the contention that the officers' claims of emotional distress are exclusively grounded in the constitutional violation, their testimony is equally vague and conclusory. The evidence of Officer Carlton's emotional distress was that he felt "slapped . . . in the face" as a result of the violation, but he offers no other explanation or evidence of his emotional distress. According to Officer

Price, he was fearful of the police force and lost faith in it, but there is no testimony describing the emotional distress he suffered. Officer Holland complained that he felt like a "patsy," but, like his colleagues' testimony, there is nothing more regarding his emotional distress. Like Officers Holl's, Corwin's, Elstrom's, and Holshouser's, Officers Carlton's, Price's, and Holland's testimony cannot support an award of compensatory damages. Accordingly, we reverse their compensatory damages awards. Again, we do not hold that a plaintiff's testimony standing alone is insufficient as a matter of law to support an award of compensatory damages, but in this case, the testimony was not sufficient to do so. Like their colleagues, Officers Carlton, Price, and Holland are entitled to one dollar nominal damages.

IV.

We hold that Appellees had standing to sue, and they were not limited to injunctive or declaratory relief. Rather, they were entitled also to recover compensatory damages for demonstrable emotional distress if their injuries could be attributed to the actual constitutional violation. Appellees, however, failed to offer sufficient proof of emotional distress. Accordingly, the award of compensatory damages in favor of Appellees is reversed, and we award each Appellee one dollar in nominal damages.

AFFIRMED IN PART AND REVERSED IN PART

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
September 30, 1996
NO. 95-1263
CA-91-158-C-C-P

DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Plaintiffs/Appellees, and

RONALD M. HAYES, RANDY L. HAGLER,

Plaintiffs,

vs.

CITY OF CHARLOTTE, NORTH CAROLINA,

Defendant/Appellant,

and

NORTH STATE LAW ENFORCEMENT OFFICERS ASSOCIATION,

Defendant

- - - - - - - - - - -

On Petition for Rehearing
with Suggestion for Rehearing In Banc

- - - - - - - - - - -

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

For the Court,
/s/ Patricia S. Connor
Clerk

Supreme Court, U.S.
FILED
JAN 14 1997
CLERK

No. 96-962

In The

Supreme Court of the United States

October Term, 1996

DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Petitioners,

vs.

CITY OF CHARLOTTE, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT CITY OF CHARLOTTE, NORTH CAROLINA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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9 pp

QUESTIONS PRESENTED

1. WHETHER THE DECISION CONFLICTS WITH *HARRIS V. FORKLIFT SYSTEMS, INC.*

2. WHETHER THE DECISION PROPERLY HELD THAT THE PLAINTIFFS FAILED TO PROVE DAMAGES FOR EMOTIONAL DISTRESS.

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STATEMENT OF THE CASE[1]

The Respondent City of Charlotte, North Carolina (hereafter "City") is satisfied with the Petitioners' (hereafter "Plaintiffs") statement of the case, with the following exceptions:

- The City submits that the statement that "[t]he 1991 promotion process was represented by high level managers of the Police Department to be one that was completely free from any racial considerations" (Petition at p. 4) is not accurate. The City never represented to the Plaintiffs that the promotional process "was completely free from any racial considerations." The 1974 consent order in effect at the time of the 1991 promotions mandated that some consideration be given to race. The City neither stated nor implied to the Plaintiffs or anyone else that race would not be considered as a factor in the promotional process.

- The goal of the 1974 consent order for promotion of black officers to sergeant was 20%, rather than 25%. (Petition at p. 4)

- The characterization of the evidence offered by each of the Plaintiffs (Petition at p. 5) is misleading. The decision below contains an accurate summary of the testimony of each of the Plaintiffs describing the circumstances of

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[1] The Respondent is satisfied with the Petitioners' citations of reports of the opinions entered by courts below, jurisdictional statement and list of constitutional and statutory provisions. The Respondent has elected pursuant to Supreme Court Rule 24.2 not to include these items in its brief.

his alleged emotional distress. (Petitioners' App. at pp. 30-35)

ARGUMENT

1. THE DECISION DOES NOT CONFLICT WITH *HARRIS V. FORKLIFT SYSTEMS.*

The Plaintiffs' reliance upon a purported conflict between the Court of Appeals decision and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) is difficult to comprehend. *Harris* does not address at all the issue here; namely, the nature of the evidence necessary to sustain an award of damages for emotional distress in an action under 42 U.S.C. § 1983. The sole issue in *Harris* was the definition of "abusive work environment" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 510 U.S. at ___, 114 S.Ct. at 369, 126 L.Ed.2d at ___. This is a threshold question of liability under Title VII, and in no way either directly or by analogy implicates any aspect of damages for emotional distress or any other remedies available to claimants under federal civil rights statutes.

2. THE DECISION PROPERLY HELD THAT THE PLAINTIFFS FAILED TO PROVE DAMAGE FOR EMOTIONAL DISTRESS.

The Plaintiffs' assertion that the Court of Appeals decision fails to consider the circumstances surrounding the discrimination is doubly misguided. On the one hand, the decision does in fact address at great length the nature and circumstances of the relationship between the

actual constitutional violation and the emotional distress allegedly suffered by the individual Plaintiffs as a result. On the other hand, the circumstances of the constitutional violation starkly illustrate the failure of the Plaintiffs to prove any damages proximately resulting from it.

The "circumstances" of the constitutional violation of equal protection were that the City used race as a factor in the promotional process in which the Plaintiffs participated, but that none of the Plaintiffs would have been promoted even in the absence of such consideration of race. The "wrong" perpetrated upon the Plaintiffs was their exclusion from consideration for all available positions, *not* the fact that they were denied one of the positions. *See Regents of California v. Bakke*, 438 U.S. 265, 281, n. 14, 98 S.Ct. 2733, 2743, n. 14, 57 L.Ed. 750, ___ (1978).

The decision below analyzes the circumstances presented by each of the Plaintiffs in detail. (Petitioners' App. at pp. 30-35.) As to one group of Plaintiffs, the Court of Appeals noted that "their injuries, if any, are properly characterized as disappointment with their superiors, rather than emotional distress." (Petitioners' App. at p. 32.) In other words, they did not suffer any "emotional distress" as that term has been defined by Supreme Court precedent. As to another group, the court concluded that "their damages arose not from emotional distress as a consequence of invidious discrimination, but rather from the City's failure to promote them." (Petitioners' App. at p. 33.) These Plaintiffs could not recover damages because their emotional distress derived from their failure to receive promotions, rather than the constitutional violation of equal protection.

The Court of Appeals clearly considered "the nature and circumstances of the wrong and its effect on the plaintiff" in its analysis, as set forth in *Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252, ___ (1978). *See also, Memphis Community School District v. Stachura*, 477 U.S. 299, 305-09, 106 S.Ct. 2537, 2542-44, 91 L.Ed.2d 249, ___ (1986). Indeed, the Court of Appeals' consideration of this point is more exhaustive than should be necessary. The simple point is that the nature and circumstances of the wrong did not have any effect on the Plaintiffs at all. Each of them applied for and failed to obtain a promotion that would have been denied to him even if the process had been entirely free of any consideration of race. Under these circumstances, it is difficult to conceive how any of the Plaintiffs even purport to have suffered emotional distress by reason of the constitutional violation.

CONCLUSION

The Plaintiffs' oblique arguments in favor of granting a writ of certiorari each go off on a tangent, rather than aim for the heart of the matter. This case has nothing to do with the definition of an abusive work environment or whether the decision of the Court of Appeals considered the circumstances surrounding the constitutional violation. Rather, the essence of issue which is the subject of the requested writ is whether any of the Plaintiffs presented sufficient evidence to support a claim of emotional distress precipitated by a constitutional violation.

The Plaintiffs do not challenge – or even mention – the Court of Appeals' application of the principles derived from other cases that have considered the viability of a claim for emotional distress supported only by a plaintiff's own testimony, including *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990) and numerous other cases cited in the decision below. (Petitioners' App. at pp. 20-29.) This omission is telling: The decision below is correct according to established law and should not be reviewed by this Court. The petition does not implicate any of the customary reasons set forth in Supreme Court Rule 10 for this Court to grant a writ of certiorari, such as a conflict with a decision of another circuit court or of this Court. In light of there being no evident reason to grant the writ of certiorari, the petition should be denied.

This the 14th day of January, 1997.

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